

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RALPH FIGGS, Individually and on behalf of all others similarly situated	§ § §
V.	§ CIVIL ACTION NO. G-11-306 § §
KIRBY CORPORATION, and KIRBY INLAND MARINE, LP	§ § §

OPINION AND ORDER

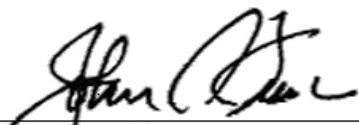
On August 17, 2012, the Kirby Defendants (Kirby) filed a “Motion to Strike Late Filed Opt-In Notices” in an effort to preclude from this potential FLSA collective action seven Plaintiffs who filed Opt-In Notices after the February 27, 2012, deadline. Were the Motion to be granted, these seven Plaintiffs would be forced to file a separate FLSA case which, if filed here, would most likely be consolidated with this case. Cf. Raper v. Iowa, 165 F.R.D. 89, 92 (S.D. Iowa 1996) (“Allowing their joinder here will not result in any meaningful prejudice to the Defendants, in fact, if Plaintiffs’ allegations are to be believed, the Defendants have already engaged in discovery with two of the seven tardy opt-ins.” Cf. Monroe v. United Airlines, Inc., 94 F.R.D. 304, 305 (N.D. Ill. 1982) (“No determination of liability has yet been made, so the Court sees no benefit in excluding these seven Plaintiffs; indeed, the desire to achieve ‘judicial economy,’ favors their inclusion.”

Kirby argues that these seven Plaintiffs should be required to show “excusable neglect” to merit inclusion and cites to three cases so holding. Even if the Court were to concede these cases are binding, which it does not, each of the cases can be distinguished. In each case the language of the Opt-In Notice warned untimely filers that they “will not be able to participate” in the

lawsuit; that language imposes a barrier to inclusion which is not present in this case. The Notice in this case cautions late filers that they “**may** lose the right to participate … in this lawsuit.” Here, the language can be read to commit the decision to include late filers to the sound discretion of the Court and, in the opinion of this Court, the proper exercise of that discretion is to include the seven Plaintiffs as members of the potential class.

It is, therefore, **ORDERED** that the “Motion to Strike Late Filed Opt-In Notices” (Instrument no. 74) is **DENIED**.

DONE at Galveston, Texas, this 3rd day of October, 2012.



John R. Froeschner
United States Magistrate Judge